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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 676

SERVE YOURSELF GASOLINE STATIONS ASSOCIATION, INC.,

Appellant,

vs.

A. A. BROCK, AS DIRECTOR OF THE DEPARTMENT OF AGRICULTURE OF THE STATE OF CALIFORNIA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT AS TO JURISDICTION

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 676

SERVE YOURSELF GASOLINE STATIONS ASSOCIATION, INC., A CORPORATION, ET AL.,

Appellants,

vs.

A. A. BROCK, AS DIRECTOR OF THE DEPARTMENT OF AGRICULTURE OF THE STATE OF CALIFORNIA, ET AL.,

URICH'S SERVE YOURSELF STATIONS, INCORPORATED, A CALIFORNIA CORPORATION, ET AL.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiffs-appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Supreme Court of the State of California entered in this cause.

Opinion Below

The opinion of the Supreme Court of California is reported at 39 California 813; 249 Pacific (2d) 545. The opinion of the District Court of Appeal of the State of Cali-

fornia, Second Appellate District, Division II, is reported in 241 Pacific (2nd) 593. Copies of these opinions are attached hereto as Appendix A.

Jurisdiction

The judgment of the Supreme Court of the State of California was entered on October 31, 1952. A petition for appeal was presented to Mr. Justice Douglas on January 29, 1953. This case at its inception was an action to enjoin the enforcement of the hereinafter cited provisions of the Business and Professions Code of the State of California on the grounds that they were violative of the United States Constitution. The trial court held the statutes valid and refused to enjoin the enforcement of them against plaintiffs, appellants herein. The District Court of Appeals reversed the trial court and finally the Supreme Court of the State reversed the District Court of Appeals, and affirmed the judgment of the trial court. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Charleston Federal Savings & Loan Association* v. *Alderson*, 324 U. S. 182; *James Stewart & Co.* v. *Sadrakula*, 309 U. S. 94; *Western Turf Association* v. *Greenburg*, 204 U. S. 359.

In satisfaction of Rule 12(1) of the Rules of the United States Supreme Court appellant calls to the court's attention the fact that the unconstitutionality of the statutes in issue here was first raised by the original complaint and petition for injunction filed in the trial court. The complaint alleged the statutes were violative of the United States Constitution and prayed that their enforcement and application to plaintiff-appellants be enjoined, and as a

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deprivation of plaintiff-appellant's valuable property rights without due process of law.

The matter was presented to the trial court on stipulated facts, and the court entered a judgment denying an injunction and declaring that the statutes were valid and constitutional.

The first paragraph of the judgment of the trial court read as follows: "That Sections 20880, 20882, 20883, 20884, 20885 and 20886, Business and Professions Code, are and each of them is proper, expedient, and constitutional in the regulation of advertising of price at which gasoline or other motor vehicle fuel is sold or offered for sale upon or near the premises of any place of business in the State of California."

Question Presented

Is a statute which prohibits a service station operator from displaying a sign which reads "Serve Yourself and Save", which sign tells the truth, an arbitrary, unreasonable, unnecessary and special law, and an unnecessary exercise of the police power which takes property without due process of law?

Statutes Involved

Sections 20880, 20882, 20883, 20884, 20885 and 20886 of the Business and Professions Code of the State of California, are set forth in Appendix B hereto.

Statement

Appellants are owners and operators of serve-yourself type of gasoline stations in California. The action was brought as a representative suit for declaratory relief to have it adjudicated and declared that §§ 20880, 20881, 20882, 20883, 20884, 20885 and 20886 of the Business and Professions Code of the State of California were invalid and un-

constitutional, and as applied to appellants and particularly to a sign which reads "Serve Yourself and Save" were unconstitutional and further appellants requested by their action that respondent officers whose duty it is to enforce said statutes should be enjoined from enforcing any of said statutes against any of the appellants and particularly as applied to a sign which reads "Serve Yourself and Save."

The appellants sue for the benefit of owners and operators of self-service type of gasoline stations, there being ninety of such stations in the State of California at the time the action was filed. Appellees are charged with the duty of enforcing and executing in the State of California §§ 20880, 20881, 20883, 20884, and 20888 of the Business and Professions Code of the State of California. Appellants maintain on their places of business signs which have been used, maintained and displayed prior to October 1, 1949. Some of said signs in large letters merely state "Serve Yourself and Save," others maintained by appellants read "Serve Yourself and Save 5." Many of said signs maintained by appellants do not refer to the name of gasoline offered for sale, nor state the price of gasoline offered for sale or otherwise conform with the provisions of §§ 20883, 20884 and 20888 of the Business and Professions Code. The signs maintained by appellants have an average value and a cost of approximately $2,000 each. The self-service type of service station operated by appellants and each of the self-service station operators represented in the action represent an average investment in each station of approximately $30,000. The signs that read "Serve Yourself and Save" and signs of similar phraseology are an integral part of the self-service gasoline station type of business. To change the signs or to blank them out would cost appellants at least $100 for each sign. To erect a sign in lieu of the present signs maintained by appellants, which new sign would con-

form to the Business and Professions Code, §§ 20880 to 20888, both inclusive, would cost each appellant approximately $1,500. Respondents threatened to prosecute appellants under the provisions of the Business and Professions Code, §§ 20880 to 20888, both inclusive, upon the grounds that the signs maintained by appellants violated the provisions of said statutes. Respondents caused notices to be served on appellants and each of them that the signs maintained by appellants were in violation of the provisions of the Business and Professions Code above referred to, and notified appellants that appellants would be prosecuted unless said signs were changed. Two of the appellants at the time of the trial had been prosecuted for alleged violation of § 20880, subdivisions (a) and (b) of the Business and Professions Code. Respondents stipulated that pending the decision of the trial court appellants would not be prosecuted.

The trial court held that the statutes were not unconstitutional but were proper exercises of the police power and refused to enjoin the appellees from enforcing the statutes against appellants. The Supreme Court of California by its judgment filed October 31, 1952, affirmed the judgment of the trial court. A petition by appellants for a rehearing in the Supreme Court of California was denied, November 25, 1952.

The Questions Are Substantial

The "Serve Yourself" type retail business in just a few post-war years has become a vital and integral part of American economic life. The gasoline industry has been one of the nurturing fields for this type enterprise, and the customer who is willing to do the work of the service station attendant should be allowed to save the owner's cost of employing an attendant. It is an enterprise the American

motoring public has taken to wholeheartedly, and "Serve Yourself" gasoline stations are flourishing in all parts of the nation. Thus far, there are decisions in five states interpreting legislation designed to regulate the "Serve Yourself" gasoline industry and many of the decisions are conflicting. A ruling by the Supreme Court of the United States construing the statutes involved in this appeal will greatly enlighten the entire industry since the California statutes are the most detailed and intricate of all such statutes.

The situation before us is not unlike *New State Ice Co. v. Liebmann*, 285 U. S. 262. There, as here, a state purported to regulate a private business which was not affected with a public interest and which did not in any way bear upon public health or morals. This court was quick to strike down the legislation involved in the *Liebmann* case which unduly and unnecessarily burdened the lawful business there involved. In the case sought to be reviewed here we have a lawful business not in any way affected with a public interest. This Court has expressly declared that the retail gasoline business is not a business affected with a public interest. *Williams* v. *Standard Oil Co. of Louisiana*, 278 U. S. 235. However, the Supreme Court of California has said that the Legislature of that state may, under the guise of the police power, legislate the lawful business out of effective existence. That court has ignored the mandate of the Supreme Court of the United States pronounced in the *Liebmann* case at page 278:

> "Plainly a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistent with the 14th Amendment."

The principal asset of the the Serve Yourself gasoline stations is the sign, "Serve Yourself and Save", which has been generally used to identify the station and proclaim to the public that the service station so identified is one operating on a different basis than other service stations. To take the sign away, or to burden it with riders and appendices that all but obliterate the essential words and in addition make the construction of such a sign financially burdensome, is to take from the industry the *sine qua non* which distinguishes it from the rest of the gasoline industry. Before such a welcome industry is rendered inoperative, appellants urge that the Supreme Court of the United States examine the situation.

The necessity for a pronouncement by the United States Supreme Court in the field of regulation of Self-Service gasoline stations is clearly evidenced by the confusion rampant in the industry due to conflicting state court decisions. A statute similar to the California provisions here under review was held unconstitutional in *Regal Oil Co.* v. *State*, 123 N. J. 456, 10 A 2d 495. To similar effect was the decision of the Supreme Court of Errors of Connecticut in *State* v. *Miller*, 126 Conn. 373, 12 A 2d 192. The decision of the Supreme Court of California here sought to be reviewed is in direct conflict with these decisions. There is also a decision by the Massachusetts Supreme Court upholding a statute regulating Self-Service stations. *Sloane* v. *Godley*, 23 N. E. 2d 133.

Unless this Court takes jurisdiction of the matter here involved a lawful, welcome, infant industry will have been legislated out of existence. It is for the best interests of the nation and the petroleum industry that the highest court of the land make its examination and pronouncement before the death of the Self-Service gasoline station industry is declared. Plaintiffs-Appellants respectfully urge the Su-

preme Court of the United States to take jurisdiction in the above matter.

Respectfully submitted,

EDWARD S. SHATTUCK,
Counsel for Petitioners.

GUTHRIE, DARLING & SHATTUCK,
MILO V. OLSON,
SALISBURY & KNUDSON,
Of Counsel.

APPENDIX "A"

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In Bank

L. A. 21968

SERVE YOURSELF GASOLINE STATIONS ASSOCIATION, INC., a Corporation, et al., *Plaintiffs and Appellants,*

vs.

A. A. BROCK, as Director of the Department of Agriculture of the State of California, et al., Respondents;

ULRICH'S SERVE YOURSELF STATIONS, INCORPORATED, a California Corporation, et al., *Intervenors and Appellants*

Plaintiffs and intervenors, owners and operators of self service gasoline stations, appeal from a judgment declaring that sections 20880, 20882, 20883, 20884, 20885 and 20886 of the Business and Professions Code, regulating price advertising on or near gasoline stations, are constitutional and are applicable to plaintiffs' price signs.

Appellants contend that the sections in question involve an improper exercise of the police power, depriving them of their property without due process of law. It is further contended that these sections violate Article IV, Section 25, subdivision 33 of the California Constitution in that they constitute a special law that is unnecessary because a general law (Bus. & Prof. Code § 17500) is and can be made applicable. We have concluded that this regulation of price advertising is a proper exercise of the police power and that the judgment must be affirmed.

The sections in question[1] require price signs, other than price signs on the gasoline dispensing apparatus (Bus. &

[1] § 20880. "(a) No person shall keep, maintain or display on or near the premises of any place of business in this State any advertising medium, which indicates or shows or advertises the price of gasoline or other motor vehicle fuel sold, offered for sale or advertised for sale from such prem-

Prof. Code §§ 20820-20826), to set forth in detail and in lettering as large as other lettering thereon, the total price of the gasoline, including tax and grade. Signs using the words "save," "off," "discount," "less," "below," or words of similar meaning are considered price signs. The signs employed by appellants and others in the business of owning or operating gasoline stations use thereon the words "SAVE," "SERVE YOURSELF AND SAVE," and "SAVE 5," followed by small lettered words "cents," "ways," "minutes," or minor variations of the same. Many of said signs do not refer to the name nor state the price of the gasoline offered for sale.

In reviewing legislation for the purpose of testing its propriety as an exercise of the police power, "[t]he power of the court is limited to determining whether the subject of the legislation is within the state's power, and if so to

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ises, unless the actual price per gallon of gasoline or other motor vehicle fuel, including taxes, is also shown on such advertising medium, together with the word or words 'gasoline' or 'motor fuel' and the trade name or brand of the gasoline or other motor vehicle fuel product advertised for sale by such advertising medium.

"(b) No person offering for sale or selling any gasoline or motor vehicle fuel from any place of business in the State of California shall post or display a sign or statement or other advertising medium reading, in substance, 'save' a designated amount, or a designated amount per gallon, such as 'save 5 cents' or 'save 5 cents per gallon,' or using the expression 'off' a designated amount, such as '5 cents off' or '5 cents less,' or 'discount' of a given amount, such as '5 cents discount,' or otherwise using the words 'save,' 'off,' 'discount,' 'less,' 'below,' or any of them, or a word or words of similar meaning or other phraseology indicating a reduced price, unless there is posted and displayed in letters of equal size and as part of the same sign, statement, or other advertising medium, the total price, including all taxes, at which gasoline or motor vehicle fuel is being sold or offered for sale, designating the price for each brand or trade name of gasoline or motor vehicle fuel being sold or offered for sale.

"The size of the letters, words, figures or numerals used for the purpose of indicating or showing the total price per gallon, including all taxes, shall be of a size as provided under the provisions of Section 20883 of this article.

"(c) Nothing in this article shall be construed to apply to the price signs referred to in Article 6 of this chapter."

§ 20882. "All letters, figures or numerals used in designating the brand name or words 'no brand' in any advertising medium referred to in this

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determine whether the means adopted to accomplish the result are reasonably designed for that purpose, and have a real and substantial relation to the objects sought to be attained." (Max Factor & Co. v. Kunsman, 5 Cal. 2d 446, 456.) Furthermore, it must be presumed at the outset that the Legislature acted within its powers. (Hart v. City of Beverly Hills, 11 Cal. 2d 343, 348.) The burden is upon those attacking the statute to make a showing that the statute is unconstitutional.

With this brief statement of the governing principles, we turn to the legislation at hand. It is apparent upon its face that the primary purpose of this legislation is the prevention of misleading advertising, which purpose has long been deemed a proper subject for the exercise of the police power. (Note, Ann. Cas. 1916 A, 960; 89 A. L. R. 1004; 2 Cal. Jur. 2d 606; and 11 Am. Jur., Constitutional Law, §283, p. 1043. See also Hart v. City of Beverly Hills, supra, 11 Cal. 2d 343, 350; In re Sidebotham, 12 Cal. 2d 434, 436; and In re McNeal, 32 Cal. App. 2d 391, 394.)

The next step is the consideration of the means employed

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article, shall be of uniform size and at least six inches in height and the height shall not be more than twice the dimension of the width of each such letter, figure or numeral."

§ 20883. "All letters, words, figures or numerals used on the advertising medium referred to in this article for the purpose of indicating or showing prices of gasoline or other motor vehicle fuel sold or advertised for sale shall be uniform in size and shall be not more than twice the size of the letters, figures or numerals used to designate the brand name, or the words 'no brand.'"

§ 20884. "The advertising medium referred to in this article shall not contain any other advertising matter whatsoever, except words of description of the product sold or offered for sale, and if words of description of the product offered for sale or advertised for sale by any such sign are used, the letters, figures or numerals which form any words, marks, letters, figures or numerals of description shall not be larger than the words, marks, letters, figures or numerals used in forming or designating the brand name or the words 'no brand.'"

§ 20885. "For the purpose of this article, fractions are considered one numeral."

§ 20886. "The numeral one or the letter 'l' need not conform to specifications prescribed for other letters, words, figures or numerals by this article but all letters, words, figures or numerals shall be the same type and design and shall be uniform with other letters, words, figures or numerals with which they are used."

by the Legislature to reach this legitimate end. These involve primarily the requirement of full disclosure, a method approved in In re Sidebotham, supra, 12 Cal. 2d 434, 436. To demonstrate the unconstitutionality of these statutes, appellants cite and rely upon a series of cases declaring statutes unconstitutional which prohibit *all* price advertising on or near gasoline stations except those signs of a limited size permitted on the pumps. (Regal Oil v. State, 123 N. J. L. 456, 10 A. 2d 495; State v. Miller, 126 Conn. 373, 12 A. 2d 192; and Levy v. City of Pontiac, 331 Mich. 100, 49 N. W. 2d 80. But cf., Merit Oil Co. v. Director, 319 Mass. 301, 65 N. E. 2d 529; People v. Arlen Service Stations, 284 N. Y. 340, 31 N. E. 2d 184; and State v. Hobson [Del.] 83 A. 2d 846.) However, the legislation under consideration here differs substantially from that involved in the above cases. There the right to maintain signs of a sufficient size to be read by a passing motorist was prohibited. Our statutes do not prohibit effective advertising in this sense. Rather, sections 20882 and 20883 of the Business and Professions Code encourage the same by establishing minimum requirements as to size of lettering on the signs, thereby making more certain that the passing motorist can read them. The difference is of significance. The ultimate right to advertise price is unaffected by our statutes. Although the Legislature may be denied the power to destroy a given right, the authority to regulate its exercise is recognized. (See Hart v. City of Beverly Hills, supra, 11 Cal. 2d 343, 350, and cases cited therein.)

The decision of the United States Supreme Court in Williams v. Standard Oil Co., 278 U. S. 235, is not a barrier to this legislation. There it was held that a state could not fix the price of gasoline for the reason that the business of selling gasoline is not one "affected with a public interest." But regardless of the standard by which the validity of price-fixing legislation should be tested (Tyson & Brother v. Banton, 273 U. S. 418, 430; See Nebbia v. New York, 291 U. S. 502; and Olsen v. Nebraska, 313 U. S. 236), the statutes in question do not deal with price-fixing and the Williams case is not controlling here.

Although the right to advertise is a property right

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(People v. St. John, 108 Cal. App. [Supp.], 779), the requirement of full disclosure of price and brand name is a reasonable method of regulating gasoline advertising, and the statutes have a real and substantial relation to legitimate objectives of the police power. The law does not become oppressive or confiscatory by reason of the fact that it may be more costly to conform to its requirements.

Nor is there any merit in the contention that this legislation represents an arbitrary attempt to eliminate competition in the retail selling of gasoline. It is not our function to search for motive in testing the constitutionality of a statute. (Daniel v. Family Ins. Co., 336 U. S. 220, 224.)

There can be no doubt that many gasoline price signs are misleading. When a motorist on the highway sees a sign which states in large letters "Save 5" or "5 Off," he can reasonably assume that he will save 5 cents per gallon below the price of gasoline sold in conventional service stations. And when these words are followed by the words "minutes," "ways," or the like, in small letters, the signs are highly misleading. Appellants do not argue at great length that the regulation of such signs is a violation of due process. Rather, they argue that the statute would be unconstitutionally applied if enforced against the sign "Serve Yourself and Save." (Brock v. Superior Court, 12 Cal. 2d 605, 610.) Respondents have indicated an intent to so enforce the statute. While it is generally true that the motorist can realize a saving in the self service type station, and that this sign is therefore literally true, we cannot agree that the application of the requirement of full disclosure of price and brand name will violate due process of law. The convenience to the motoring public in having the price per gallon plainly disclosed where there is a representation that a saving can be made may well have been a real consideration of the Legislature in enacting the statutes. The Legislature, in the first instance, is the judge of what is necessary for the public welfare, and, in the absence of a showing of arbitrary interference with property rights or of the lack of a substantial relation between means and a legitimate subject for regulation, we can not declare this legislation invalid.

The final contention that this statute violates Article IV, Section 25, subdivision 33 of the California Constitution is likewise without merit. This section states: "The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: In all other cases where a general law can be made applicable."

The question whether a general law can be made applicable is one of the Legislature, "to be determined in the light of the evils intended to be avoided, and with its determination upon that question we may not interfere, unless the disregard of the constitutional requirement is clear and palpable." (People v. Mullender, 132 Cal. 217, 221; Accord: Wheeler v. Herbert, 152 Cal. 224, 232; Matter of Petition of Burke, 160 Cal. 300, 302-303; and Harbor Dist. v. Board of Supervisors, 211 Cal. 271, 276-277.) There is no disregard of the constitutional requirement here. To the contrary, it is apparent that section 17500 of the Business and Professions Code, which prohibits false or misleading advertising in general, could not be applied to require a full disclosure of price or brand name of gasoline offered for sale.

The distinction between a general and a special law within the meaning of the Constitution has been stated as follows: "[A law] . . . is general . . . when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction. . . . [It is a special law] . . . if it confers particular privileges or imposes peculiar disabilities or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law." (City of Pasadena v. Stimson, 91 Cal. 238, 251-252.) It is therefore clear that the constitutional prohibition against special legislation does not preclude legislative classification, but only requires that the classification be reasonable. (See People v. Western Fruit Growers, 22 Cal. 2d 494, 506, and cases cited therein.) Here, the legislation applies equally to all persons engaged in the business of selling gasoline. The classification is a reasonable one. Gasoline is a unique commodity in that few people, if any,

can distinguish between grades or brands by the use of the senses. Unlike many other commodities, its sale is final in the sense that there is no practical way for the motorist to return or exchange the purchased commodity, if dissatisfied. Price and brand name are the principal factors in its sale, and therefore, advertising of these elements in a misleading manner is peculiarly subject to abuse. Furthermore, it must be presumed that the Legislature has made a careful investigation in the field, and that it has properly determined that the interest of the public requires this regulation. (Pacific Coast Dairy v. Police Court, 214 Cal. 668, 674.) No showing to the contrary has been made.

The judgment is affirmed.

SPENCE, J.

We concur:

GIBSON, C. J.
SHENK, J.
CARTER, J.
TRAYNOR, J.
SCHAUER, J.
McCOMB, J., *pro tem.*

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

Division One

Civil No. 18559

SERVE YOURSELF GASOLINE STATIONS ASSOCIATION, INC., a corporation, et al., Plaintiffs and Cross-defendants and Appellants,

vs.

A. A. BROCK, as Director of the Department of Agriculture of the State of California, et al., Defendants, Cross-complainants and Respondents.

UBICH'S SERVE YOURSELF STATIONS, INCORPORATED, a California corporation, et al., Intervenors and Appellants.

Appeal from a judgment of the Superior Court of Los Angeles County, Julius V. Patresso, Judge.

For Appellants: Guthrie, Darling & Shattuck, Milo V. Olson; Salisbury & Knudson.

For Respondents: Edmund G. Brown, Attorney General; John F. Hassler, Deputy Attorney General.

This is a representative suit for declaratory relief instituted by several operators of serve-yourself type of gasoline stations who sought an adjudication that a statute, purporting to prohibit certain types of advertising signs on or near filling stations, is not applicable to the signs erected by them; and, if the statute is applicable that it is unconstitutional.

The various signs involved in this case differ somewhat in that some state thereon merely the word "Save"; others, "Serve Yourself and Save"; and still others, "Save 5" in large letters followed in small letters by either the word "cents," or "ways" or "minutes," or minor variations of the same general tenor.

The statute here involved,[2] enacted in 1949, is but a continuation or enlargement of a series of statutes initially enacted since 1931 seeking on the one hand to require, and on the other hand, to restrict the manner and method of posting prices of gasoline and oils at filling stations.

The initial statute enacted in 1931 required filling stations to post on all gasoline pumps the brand, trade-mark or trade name (or if none then "no brand") and the price per gallon of all gasoline dispensed therefrom. The validity or applicability of this statute as it has since been amended is not involved in the instant case. The statute before us, first partially enacted in 1941, and later amended after the advent of the so-called "serve yourself" filling stations, restricts the use of all price signs at or near the stations to the statutory required price sign on each pump, unless such added price sign or signs set forth in detail

[2] Bus. & Prof. Code, sec. 20880: "(a) No person shall keep, maintain or display on or near the premises of any place of business in this State any advertising medium, which indicates or shows or advertises the price of gasoline or other motor vehicle fuel sold, offered for sale or advertised for sale from such premises, unless the actual price per gallon of gasoline or other motor vehicle fuel, including taxes, is also shown on such advertising medium, together with the word or words 'gasoline' or 'motor fuel' and the trade name or brand of the gasoline or other motor vehicle fuel product advertised for sale by such advertising medium.

and in lettering as large as any other lettering thereon, the total price per gallon including taxes of any brand or grade (naming it) of gasoline offered for sale on the premises. A price sign by the express words of the statute includes any sign whereon appears the word "Save."

As each and every one of the signs involved in this appeal contains the word "Save," it follows that all the signs are within the purview of the statute and that they all violate the statute because they fail to set forth the details required by the statute, i.e, the total price including taxes along with the trade name or brand of the gasoline advertised for sale. The fact that all the operators, here involved, regardless of the language used on their signs sold gasoline at a price less than that of the conventional stations is under the language of the statute immaterial and hence a false quantity.

That being the case we come to the sole remaining question, which is whether the statute is unconstitutional insofar as it requires the statutory details above mentioned to be set forth upon the signs here involved. On that point we are of the opinion that the statute is clearly unconstitutional.

In so ruling we wish to say at the outset that we perceive that the purpose of the legislature in enacting the statute may not only be regarded as salutary but that it is a well-intentioned endeavor to eradicate a present-day evil, i.e., misleading advertisements. When a motorist driving along a street or highway is faced with a sign stating in large letters "Save 5," readable by him at a distance, we think he may well expect upon turning into the station to save 5 cents on the price of either regular or ethyl gasoline below that of the price of the conventional service stations. If in turning into the station and stopping at a pump he learns upon a closer inspection of the sign or from the price posted on the pump that he will not save anything in the way of price or at least less than 5¢ per gallon he unquestionably has been misled by the sign and quite naturally may be irked. Conceivably he may be misled once, but we think it quite possible, if not probable, that he will not again thereafter stop at a filling station displaying in large letters the word "Save" unless his gasoline tank is too near empty to pro-

ceed further. If that be his attitude, as we believe it may well be, then the operators of filling stations who use the words "Save 5" on their signs and actually sell their gasoline at 5c less than the conventional price will thereafter be harmed to a greater or less extent. The laws of compensation, as enunciated by Emerson, still hold full sway. But, be that as it may, the constitutionality of a statute may not be measured by the fact it is salutary from the standpoint of a consumer or the general public in that it tends or may tend to eradicate an evil such as misleading advertisements.

In coming to grips with the question before us we must assay the statute in the crucible of constitutional law. In that appraisement we are faced with the long-established principle that a state legislature may not regulate or control private business unless it is affected with a public interest, which is not the case here (Williams v. Standard Oil Co., 73 L. Ed. 287, 278 U. S. 235), or unless it is necessary for the public safety, public health or public morals, or any phase of the public welfare—all of which come under the head of the police power and no other constitutional power. The public safety may require that a filling station be controlled or regulated so as to eliminate the danger from fires or explosions of gasoline; the public health may possibly require that gasoline fumes be controlled; the public morals that gasoline filling stations should operate as such and not as fronts for businesses inimical to public morality. But just how signs of the character here involved can possibly endanger or affect the public safety, the public health, the public morals or the public welfare we fail to see, and in that aspect the brief of the attorney general is not convincing. To be sure the price which the great host of consumers—the general public—must pay for an article affects more or less the financial welfare of this great segment of the public, but even so it has never yet been held that a legislature may regulate prices under the public welfare concept. In that aspect Williams v. Standard Oil Co., 278 U. S. 235, is the leading and controlling authority to the contrary.

If it is important to the public welfare to steer the public

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away from filling stations that advertise upon large signs, in large letters, the word "Save"—without stating in detail the saving. Then it is equally true that the public welfare requires that all other businesses who do the very same thing should be pilloried by like statutes. There is nothing about the filling station business in its endeavor to sell a gallon of gas that differentiates it from the grocer who endeavors to sell a can of peas. The public is not harmed if it chooses to buy a gallon of gas, without service, at a price less than a gallon with service, but the welfare of a conventional dealer who gives the service may well be affected. That, however, does not affect the public welfare, but only the welfare of competitors in the business of supplying gasoline.

The operator of a serve-yourself filling station is engaged in selling gasoline without service and in order to compete with the conventional type of station he must sell for less. His product appeals to the passing motorist only if such motorist prefers to wait on himself in return for a saving on the regular price of the product. The appeal is akin to that made to a housewife by the serve-yourself grocery. To compete, the grocery and the filling station must advertise the fact that a patron will save. The word "Save" blazoned on a sign upon the grocery store cannot be differentiated in its appeal, in its drawing power, or in its opportunity for fraud from that of a like sign at a filling station. A sign bearing only the word "Save" or "Serve-Yourself and Save" is not *per se* misleading or fraudulent. It is only when the commodity is sold at a price at which there is no saving that the sign may be said to attain the status of being misleading or fraudulent. The passing motorist is no more entitled to have the saving spelled out for him than is the passing consumer entitled to have the grocery do likewise. The fact that the statute applies to dealers of petroleum products only and not to dealers of other commodities is not by this mere difference a sufficient classification to save the statute from a charge it is discriminatory and violates the equal protection clauses where the end operation or result is the same. (Cf. Liggett Co. v. Lee, 288 U. S. 517.)

A motorist may be inconvenienced when he drives into a

filling station which does not advertise that it is a self-service station or which does not advertise by large signs the price of the product sold. Likewise he is inconvenienced if the price is higher than he expected to pay regardless of whether there is or is not a large sign bearing the word "Save." But any such inconvenience suffered by the prospective purchaser is not a fraud upon him or of such moment as to warrant the exercise of the police power to save him from the inconvenience.

The statute not only interferes arbitrarily with private business, but in addition it imposes unreasonable and unnecessary restrictions upon such business. (New State Ice Co. v. Liebmann, 285 U. S. 262.) Moreover, the statute violates our state constitution (Art. IV, sec. 25[33]) in that it is a special law that is unnecessary because a general law is and can be made applicable. Such a law is Business and Professions Code, sec. 17500, which makes it unlawful for dealers, such as we have here, to advertise a fact which is untrue or misleading.

The statute before us differs from the statutes of several other states which have sought to restrict filling stations from advertising their product in that those statutes endeavored to bar all advertising of prices save upon the very small signs permitted on the pumps, whereas our statute permits such additional price signs but only if they spell out the saving. However, the principle applied in holding such statutes unconstitutional is equally applicable here. The cases all proceed on the theory that such additional signs have no detrimental effect upon, and bear no reasonable relation whatsoever to, public safety, health, morals or welfare. (State v. Miller [1940] 126 Conn. 373, 12 Atl. 2d 192; Regal Oil Co. v. State [1939] 123 N. J. L. 456, 10 Atl. 2d 495; Levy v. City of Pontiac, 331 Mich. 100, 49 N. W. 2d 80; Cf. People v. Mestichelli [1939] 18 N. Y. S. 2d 406; Alabama Independent Serv. Station Ass'n v. McDowell, 242 Ala. 424, 6 So. 2d 502; State v. Hobson (Del.) [1951], 83 Atl. 2d 846. Views contrary to those reached by the Connecticut, New Jersey and Michigan courts are those of Massachusetts and New York. (Slome v. Godley, 304 Mass. 187, 23 N. E. 2d 133; Merit Oil Co. v. Director of

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Division of Neces. of Life, 319 Mass. 301, 65 N. E. 2d 529, and People v. Arlen Service Stations, 284 N. Y. 340, 31 N. E. 2d 184.)

As in our view the act is unconstitutional as applied to the signs here involved the judgment appealed from should be and it is reversed.

HANSON,
J. Pro Tem.

We concur:

WHITE, *P. J.*
DRAPEAU, *J.*

"(b) No person offering for sale or selling any gasoline or motor vehicle fuel from any place of business in the State of California shall post or display a sign or statement or other advertising medium . . . using the words 'save,' . . . , or a word or words of similar meaning or other phraseology indicating a reduced price, unless there is posted and displayed in letters of equal size and as part of the same sign, statement, or other advertising medium, the total price, including all taxes, at which gasoline or motor vehicle fuel is being sold or offered for sale, designating the price for each brand or trade name of gasoline or motor vehicle fuel being sold or offered for sale.

"The size of the letters, words, figures or numerals used for the purpose of indicating or showing the total price per gallon, including all taxes, shall be of a size as provided under the provisions of Section 20883 of this article.

"(c) Nothing in this article shall be construed to apply to the price signs referred to in Article 6 of this chapter." (i.e., referring to price signs on pumps.)

Sec. 20881: "If gasoline or other motor vehicle fuel is offered for sale or advertised for sale from the premises of any place of business in this State, but not under any trade name or brand name, then the words 'no brand' shall be used and designated on the advertising medium."

Sec. 20883: "All letters, words, figures or numerals used on the advertising medium referred to in this article for the purpose of indicating or showing prices of gasoline or other motor vehicle fuel sold or advertised for sale shall be uni-

form in size and shall be not more than twice the size of the letters, figures or numerals used to designate the brand name, or the words 'no brand.' "

APPENDIX "B"

Business & Professions Code

§ 20880. (a) No person shall keep, maintain or display on or near the premises of any place of business in this State any advertising medium, which indicates or shows or advertises the price of gasoline or other motor vehicle fuel sold, offered for sale or advertised for sale from such premises, unless the actual price per gallon of gasoline or other motor vehicle fuel, including taxes, is also shown on such advertising medium, together with the word or words "gasoline" or "motor fuel" and the trade name or brand of the gasoline or other motor vehicle fuel product advertised for sale by such advertising medium.

(b) No person offering for sale or selling any gasoline or motor vehicle fuel from any place of business in the State of California shall post or display a sign or statement or other advertising medium reading, in substance, "save" a designated amount, or a designated amount per gallon, such as "save 5 cents" or "save 5 cents per gallon," or using the expression "off" a designated amount, such as "5 cents off" or "5 cents less," or "discount" of a given amount, such as "5 cents discount," or otherwise using the words "save," "off," "discount," "less," "below," or any of them, or a word or words of similar meaning or other phraseology indicating a reduced price, unless there is posted and displayed in letters of equal size and as part of the same sign, statement, or other advertising medium, the total price, including all taxes, at which gasoline or motor vehicle fuel is being sold or offered for sale, designating the price for each brand or trade name of gasoline or motor vehicle fuel being sold or offered for sale.

The size of the letters, words, figures or numerals used for the purpose of indicating or showing the total price per gallon, including all taxes, shall be of a size as provided under the provisions of Section 20883 of this article.

(c) Nothing in this article shall be construed to apply to the price signs referred to in Article 6 of this chapter.

§ 20882. All letters, figures or numerals used in designating the brand name or words "no brand' in any advertising medium referred to in this article, shall be of uniform size and at least six inches in height and the height shall not be more than twice the dimension of the width of each such letter, figure or numeral.

§ 20883. All letters, words, figures or numerals used on the advertising medium referred to in this article for the purpose of indicating or showing prices of gasoline or other motor vehicle fuel sold or advertised for sale shall be uniform in size and shall be not more than twice the size of the letters, figures or numerals used to designate the brand name, or the words "no brand."

§ 20884. The advertising medium referred to in this article shall not contain any other advertising matter whatsoever except words of description of the product sold or offered for sale, and if words of description of the product offered for sale or advertised for sale by any such sign are used, the letters, figures or numerals which form any words, marks, letters, figures or numerals of description shall not be larger than the words, marks, letters, figures or numerals used in forming or designating the brand name or the words "no brand."

§ 20885. For the purpose of this article, fractions are considered one numeral.

§ 20886. The numeral one or the letter "1" need not conform to specifications prescribed for other letters, words, figures or numerals by this article but all letters, words, figures or numerals shall be the same type and design and shall be uniform with other letters, words, figures or numerals with which they are used.

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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1952.

No. 676.

SERVE YOURSELF GASOLINE STATIONS ASSOCIATION, INC., *et al.*,

Appellants,

vs.

A. A. BROCK, *et al.*,

Appellees.

URICH'S SERVE YOURSELF STATIONS, INC., *et al.*,

Intervenor.

Appellants' Reply to Appellees' Motion to Dismiss or Affirm and Statement Making Against Jurisdiction.

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Appellants' Reply to Appellees' Motion to Dismiss or Affirm and Statement Making Against Jurisdiction.

I.

The Assignment of Errors in Appellants' Jurisdictional Statement Is Sufficient.

The sole function of the assignment of errors is to apprise the court and opposing counsel of those contentions which must be met by opposing counsel and passed upon by the court. The assignment of errors in this case must be read in the light of the unusual circumstances under which the case came to issue and was presented in

the lower courts. As indicated by appellees' opposing statement at page 2 there were originally three Causes of Action alleged in appellants' complaint to the trial court. When appellants failed to amend their pleading after appellees' demurrer to the first two causes of action was sustained the matter went to trial on the allegations of the Third Cause of Action. The Third Cause of Action incorporated all of the allegations of the First Two Causes of Action. It was a cause of action for declaratory relief in which appellants asked the court to declare that the statutes in issue were unconstitutional and unconstitutionally applied to appellants' sign "Serve Yourself and Save." It must be remembered that the case went to trial on a set of stipulated facts. There was no trial in the ordinary sense, hence there are no specific errors such as usually occur in the trial of a lawsuit which can be assigned as error. In *Seaboard Air Line Ry. Co. v. Watson*, 287 U. S. 86, which appellees have cited as authority that the assignment of errors by appellant is not sufficient, the basis of the court's objection to the assignment was that even after a lengthy trial there were no specific errors alleged.

Both at the trial stage and through the presentation of the matter on appeal before the District Court of Appeal and the Supreme Court of California the proceedings involved the determination of the validity of the statute as measured against appellants' sign "Serve Yourself and Save." The sole question was whether the statutes in issue were unconstitutional in that they de-

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prived appellants of the right to maintain this sign, a valuable property right, unfettered by burdensome additions. That same question is presented by this appeal and is expressly set forth in the assignment of errors at paragraph 2. This assignment alone clearly sets forth the one issue before this court, and when coupled with the statement of the "questions presented" in appellants' jurisdictional statement, it clearly and adequately specifies the exact question appellants seek reviewed here, and what contention appellees must meet.

II.

The Constitutional Question Was Raised in the Initial Stages of the Case.

Appellees' statement opposing jurisdiction asserts that appellants' contentions that the statutes were unconstitutional and were unconstitutionally applied was first raised on appeal for the reason that the case went to trial on the Third Cause of Action. However, it is to be noted that the Amended Complaint in its Third Cause of Action specifically incorporated all allegations and contentions of the First and Second Causes of Action and the case went to trial on all of the allegations of the original complaint. These contentions included both the argument that the statute was unconstitutional and was unconstitutionally applied to the appellants so as to deprive them of their property without due process of law. These allegations more than adequately show that the appellants' contentions that the statutes were violations of the United States Constitution were raised at the in-